No. 80-1761

ALEXANDER L. S...

Supreme Court of the United States

October Term, 1980

JERRY DUPLER,
Petitioner,

vs.

MANSFIELD JOURNAL CO.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

This is an action for libel involving the Petitioner, Jerry Dupler ("Dupler"), who at the time of publication was a Councilman of the City of Dover, Ohio, a candidate for Mayor of said city, and a Private Investigator.

Dupler, as Plaintiff, brought suit in Common Pleas Court of Tuscarawas County, Ohio, complaining of statements in an editorial written by Editor Harry Yockey ("Yockey") and which was published April 9, 1975 in the Times-Reporter, a newspaper owned by the Defendant (Respondent) which was published in New Philadelphia, Tuscarawas County.

The first paragraph of Petitioner's *Statement of Facts* is incorrect. Dupler says that his cause of action is

"based upon a series of newspaper stories and an article appearing in the editorial page between the dates of April 4th and April 9th, 1975." (Page 3 of Petitioner's Brief).

In fact, Dupler complained *only* of the editorial of April 9, 1975 in the Complaint he filed in Court, and in his subsequent testimony. (T. 299)* The editorial in question is Petitioner's Appendix "J" and is reproduced as published, as Respondent's Appendix "A6".**

Dupler, first contacted by a constituent as a Councilman (T. 270), and later hired by him to do private investigatory work (T. 271) became involved in a controversy with the New Philadelphia Police relating to his activities as a Private Investigator.

These events were reported by the Times-Reporter in two news articles, one (P-A. "H") published April 4, 1975, and the other (P-A. "I") published April 8, 1975. (This article is erroneously designated as an article of April 5*th* in Petitioner's Appendix.)

It is uncontradicted that the editorial (R-A. A6), was written solely by the Editor (Yockey) who had obtained the facts from the two preceding news articles published in the Times-Reporter (Yockey Deposition pages 6-8; T. 95, 96). These two news articles reported the details of an inquiry by the New Philadelphia Police and the Tuscarawas County Prosecutor into Plaintiff's procedure as a private investigator in recovering stolen property for a client. The news facts for the two articles were gathered by various reporters and the two articles

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*References to "T. ....." are to appropriate pages of the transcript of the trial.

**References to "P-A. ....." are to appropriate pages of the Appendix of Petitioner's Brief and references to "R-A. ....." are to appropriate pages of the Appendix to Respondent's Brief.

themselves were written by separate reporters, all as normal beat coverage. Yockey was not personally involved in the investigation, writing or publication of the two articles.

The first news story contained a misinterpretation of Section 4749.05, Ohio Revised Code (R-A. A2) relating to procedures to be employed by a private investigator. This Code section states (among other provisions):

....

"(B) No private investigator nor any of his employees shall engage in the business of private investigation unless, *within twelve hours of their arrival,* they report their presence and length of stay to the sheriff and police chief of any county or municipality in which they operate." (emphasis added).

After conference with the Police Chief and a perusal of the Code section (T. 145), Reporter Simmelink wrote, in the second paragraph of the first news article on April 4th (P-A. "H"):

"According to police, Dupler, a Dover mayoral candidate, violated a section of Ohio Revised Code which states a private investigator must give a sheriff and police chief 12 hours *advance notice* of his involvement in a case." (emphasis added).*

Continuing at the 15th paragraph of this article of April 4th, Reporter Simmelink says:

"The chief said that the unorthodox involvement of Dupler and Dinolfo have 'screwed up' the investiga-

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*Note that the reporter has said *"advance notice"* rather than the wording of the statute, *"Within 12 hours of their arrival"*. This misinterpretation carries through this first news article of April 4th, the second news article of April 8th, and the editorial of April 9th (the subject of this action).

tion, and he is not sure if enough evidence can be gathered now to file charges."

Chief Locker admitted discussing these matters with the reporter, and making these statements (T. 198-199).

The misquote regarding the statute was continued in the article of April 8th written by another reporter (Mizer) at the 12th paragraph (P-A. "I"):

> "Shew said the prosecutor's office won't charge Dupler with violating Ohio Law which states a private investigator must give a sheriff and police chief 12 hours advance notice of his involvement in the case, Shew said 'We're not concerned with Dupler not notifying the police'."

Again, at the 13th paragraph:

> "Prosecutor Ron Collins, who was not at the meeting, emphasized Shew's comments by stating that if such a violation did occur, he would not prosecute it because of 'a lack of criminal intent'."

Editor Yockey, in his editorial written the preceding day and published on April 9th, commented upon the lack of motivation by the prosecutor in following up on Dupler's activities involving the City Police. The editorial column (plainly marked "Opinion") (R-A. A6) contained, in its entirety, the following views:

> "PROSECUTOR'S OFFICE REMISS
>
> The Tuscarawas County prosecutor's reaction to the seizure of a stolen stereo set and several other items at a New Philadelphia apartment by Jerry Dupler, Dover councilman and a private eye, is somewhat surprising.

Prosecutor Ron Collins indicated there would not be any prosecution because of 'a lack of criminal intent.'

Private investigators, under Ohio law, must inform authorities 12 hours in advance of participation in a case. The prosecutor revealed he had been contacted about a search warrant the night Dupler, acting in behalf of Brad Dinolfo, made the seizure. However, the prosecutor said he didn't think police had 'sufficient justification' for a warrant.

The prosecutor's office, we are certain, prosecutes numerous cases wherein 'criminal intent' is not evidence. J. C. Shew, an assistant prosecutor, added that their office isn't concerned that Dupler, employed by Cloverleaf Security, had not informed police of his intentions. Nor is the prosecutor's office concerned over the fact that Dupler did not have a search warrant.

It seems to us that Dupler, if he is qualified as a licensed private investigator, ignored Ohio law twice—by not giving authorities the proper notification and then by making a seizure without a search warrant.

It is proper to ask, in view of the circumstances, what the intent was behind Dupler's actions. It also is proper to ask if the prosecutor's office is politically motivated in its unconcern.

If Jerry Dupler is going to continue his work as a private eye the prosecutor's office should at least make certain he refrains in the future from ignoring Ohio statutes."

The Editor made no separate investigation of the facts other than to specifically ask the Managing Editor a ques-

tion as to the respective political parties of the Plaintiff and the Prosecutor. He relied upon the information in the two news articles as being accurate, in writing and publishing the editorial (Yockey Deposition pp. 8-22, 49) (T. 96-111; 338-395). This evidence was not contested or contradicted in the Motion for Summary Judgment or during trial.

Four months after publication, the Times-Reporter received a letter dated August 6, 1975 (R-A. A7), from Dupler's attorney demanding that an enclosed sworn statement from Dupler (R-A. A8) be published in accordance with "Section 2739.13, Section 2739.14, Section 2739.15 and Section 2739.16 of the Revised Code of the State of Ohio." (Petitioner has included Sections 2739.13 and 2739.14 as (P-A. "K-1" and "K-2"). Respondent has included Section 2739.15 and Section 2739.16 as R-A. A1.) On August 12, 1975, the Defendant published on the editorial page of its newspaper, Dupler's proffered statement under the headline "editorial is rebutted". (R-A. A10)

Preliminary Motions and Trial

On March 12, 1976, the libel Complaint in this action was filed. Dupler, Plaintiff, complained of the editorial of April 9th, 1975. Defendants answered, and asserted that the article was privileged under the United States Constitution, denying Plaintiff's claim of "actual malice" and asserting that the statements were true. Dupler answered Interrogatories and made certain written admissions propounded by Defendant. Defendant deposed Dupler.* Dupler deposed Editor Yockey and the Managing Editor, James Davis. On the basis of the facts developed in these pleadings, depositions and other discovery, Defendant moved

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*Pertinent portions of Dupler's testimony at deposition, i.e., actual malice is included in Respondent's Appendix at A11.

for Summary Judgment. Dupler filed his own affidavit opposing the Motion. Said affidavit was not pertinent to the issue of actual malice. After fifteen months of deliberation on the Motion, on April 17, 1978, the Trial Court denied the Motion for Summary Judgment, deciding that the use of the words "it seems to us" in the style of the editorial, created the "thread" of an issue that persons other than Yockey might have written the editorial, thus creating a fact to be determined by a jury (P-A. "C-3", "C-5"). The action proceeded to trial by jury. At the outset of trial Defendant's request for a reconsideration of its Motion for Summary Judgment was denied. At the close of Plaintiff's evidence, Defendant moved for a Directed Verdict on the ground that Dupler had failed to meet his burden, as a public official, of introducing sufficient evidence from which the jury could conclude that Defendant published Yockey's editorial with knowledge that facts therein were false or with a high degree of awareness of their probable falsity. The Motion was overruled (T. 336, 351). The Motion for Directed Verdict was renewed at the close of Defendant's evidence at which time it was again overruled (T. 398). The jury returned a verdict in favor of Dupler for general and punitive damages and attorneys fees in the total amount of $149,000.00 (P-A. "F-1").

The Decision of the Court of Appeals

The Respondent appealed to the Court of Appeals, 5th District, Tuscarawas County, citing seven Assignments of Error. The Court of Appeals reversed the jury verdict, sustaining Defendant's first four Assignments of Error (see the Court of Appeals' Opinion P-A. "B"), deciding that the Trial Court erred

(1) in failing to sustain Defendant's Motion for Summary Judgment;

(2) in failing to sustain Defendant's Motions for a Directed Verdict because Plaintiff had failed to show "actual malice" as the term constitutionally relates to Plaintiff as a public official in a libel action; and,

(3) in failing to sustain the Motions for Directed Verdict because the statements were expressions of opinion and were therefore protected as privileged comment;

(4) in failing to sustain Defendant's objection to Plaintiff's introduction of testimony relating to Defendant's compliance or non-compliance with O.R.C. 2739.13, 2739.14; 2739.15 in printing Plaintiff's reply, for the reason that the statutes are unconstitutional and testimony regarding Defendant's compliance or lack of compliance was prejudicial on the issue of malice.*

The remaining three Assignments of Error being moot were not considered.

The Decision of the Ohio Supreme Court

The Plaintiff Petitioner then sought review by a Motion to Certify the record of the Court of Appeals to the Ohio Supreme Court. The Court of Appeals had sustained Respondent's Fourth Assignment of Error, and had determined that Ohio Revised Code Sections 2739.13 and 2739.14 (P-A. "K-1", "K-2") were unconstitutional as being an infringement of the First Amendment of the Constitution of the

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*Petitioner relies heavily upon the fact that the jury in answering Interrogatories submitted with the verdict (P-A. "G-1") certain facts were "false" and that they were published with "actual malice". It was interesting to note that the Court of Appeals commented in its opinion (P-A. "B-17") that the Trial Court, by permitting prejudicial evidence to be admitted on the question of "Retraction" as it applied to the Editor's "state of mind" might explain the jury's finding of "actual malice".

United States and contrary to this Court's decision in *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), and consequently the Motion to certify the record was granted. Thereafter the Ohio Supreme Court reviewed the entire record, as it was bound to do, and affirmed the Court of Appeals' judgment for the Defendant. In the words of the Ohio Supreme Court (P-A. "A-11"):

> "Having re-examined all the evidence before the Trial Court on the Motion for Summary Judgment, and taking all reasonable inferences in the light most favorable to Appellant, we find that a jury acting reasonably could not find actual malice with convincing clarity. Therefore, summary judgment should have been granted for Appellee.[6]"

Further, the Court in its Footnote 6 (P-A. "A-11") said:

> "In the light of this conclusion, it is unnecessary for this Court to review the Court of Appeals' determination that Defendant's Motions for Directed Verdict should also have been granted. However, we do note that there was no additional evidence adduced at trial from which a reasonable jury could find actual malice, at the time of publication, with convincing clarity."*

The Ohio Supreme Court did, however, further decide that while the admission of evidence regarding Defendant's actions or failure to act with regard to the retraction were prejudicial and inappropriate as bearing on the mental state and attitude of Yockey, the admission of evidence did not raise the issue of the constitutionality of these statutory provisions. Consequently the Court of Appeals

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*Neither, did the Ohio Supreme Court comment on the Court of Appeals' decision that the editorial was an expression of opinion and hence privileged. (Defendant's Assignment of Error #3 to the Court of Appeals.)

had no occasion to pass on their constitutionality, and erred in so doing (P-A. "A-12").

Petitioner's Motion for Reconsideration was rejected and it is from this Order that he appeals to this Court for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

1. THE DECISION OF THE SUPREME COURT OF OHIO AFFIRMING THE FIFTH DISTRICT (OHIO) COURT OF APPEALS DECISION WHICH CORRECTLY APPLIED THE SUMMARY JUDGMENT PROCEDURE OF THE OHIO RULES OF CIVIL PROCEDURE DOES NOT CONFLICT WITH THE DUE PROCESS PRINCIPLES ENUNCIATED BY DECISIONS OF THIS COURT.

Rule 56 of the Ohio Rules of Civil Procedure (see R-A. "A2") is substantially identical to Rule 56 of the Federal Rules of Civil Procedure.

It has long been established that Summary Judgment is a constitutionally viable procedure, and one approved by this Court, where correctly applied. In support of its Motion for Summary Judgment the Respondent submitted competent evidence directed toward the propositions that the Editor (Yockey) was solely responsible for the writing and publishing of the editorial; that his information was gathered solely from his reading of the two previous news articles, and; that at the time of publishing the editorial he did not know it contained erroneous statements gleaned from those previous articles. He was oblivious of any inaccuracy until he received a letter from Dupler's attorney four months later.

Petitioner did not submit any evidence relative to this issue to counter the Motion for Summary Judgment or to support his claim at trial.

If, as the Court of Appeals agreed, Yockey's comments did not rise above an opinion of the statutory obligation of the Plaintiff Dupler (based upon disclosed facts in the editorial and the preceding two news articles), then said comments although erroneous, were privileged, and the Editor's knowledge was not an issue (P-A. "B-14"). *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Orr v. Argus-Press Company*, 586 F.2d 1108 (6th Cir. 1968), *cert. denied*, 440 U.S. 960; RESTATMENT OF TORTS (Second) (A.L.I.) Section 566 (1977).*

If, however, the comments of Yockey in the editorial were not privileged opinion, then, in the light of the evidence submitted by the Respondent in support of the Motion for Summary Judgment, Petitioner was obligated to demonstrate to the court that the evidence before the court, construed most favorably to him, demonstrated a genuine issue of fact concerning the material issue, i.e., actual malice.

Consistent with *New York Times v. Sullivan*, 376 U.S. 254 (1964) is the proposition that only the publication of knowing falsehoods or falsehoods published with reckless disregard of the truth are actionable. Reckless disregard, this Court has held, may only be proved by demonstrating that the Defendant "entertained serious doubts as to the truth" of the publication, *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), or published with a "high degree of awareness of their probable falsity" *Garrison v. Louisiana*,

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*The Supreme Court of Ohio did not rule on the Court of Appeals decision sustaining this Assignment of Error, having determined that the appeals court was correct in granting Defendant's Motion for Summary Judgment.

379 U.S. 64, at 74 (1964). See generally, *Herbert v. Lando,* 441 U.S. 153 (1979). Certainly the comments in the editorial relative to this public official, a candidate for office, were pertinent. *Monitor Patriot Co. v. Roy,* 401 U.S. 265 (1971).

Petitioner accepts the above principles as applying in this case (Petitioner's Brief, page 8). It should be noted that he does not argue in his Brief that the reviewing courts came to an incorrect decision when they considered all of the evidence before the Trial Court *at the Summary Judgment stage* and, resolving all reasonable inferences in a light most favorable to him, that a jury acting reasonably could find actual malice with convincing clarity. Instead, he argues that this Court's decision in *Hutchinson v. Proxmire,* 433 U.S. 11 (1979) rendered summary judgment procedure in First Amendment cases somehow ineffective, or of at least little value, and further, that a reviewing court is precluded from reviewing the evidence at the summary judgment stage after a jury verdict, supported by jury interrogatories, had decided the same issue.

The issue properly before this Court is not whether summary judgment is viable as a concept, but whether Ohio summary judgment procedure was correctly applied in this cause. Otherwise stated, did the Petitioner receive due process in the Ohio Appellate review?

It is clear to Respondent that the decision in *Hutchinson v. Proxmire, supra,* does not apply in this case. It is equally clear that this Court's comment in Footnote 9 of *Hutchinson v. Proxmire* has initiated a second look at summary judgment procedure in First Amendment cases. If it had been the rule rather than the exception that summary judgment be granted—that so called rule no longer exists. For those trial courts who had considered that the

rules applicable to summary judgment in all civil cases should be applied equally in First Amendment cases, the comment in Footnote 9 of *Hutchinson* was of little significance. Those courts who would have taken a more liberal view, have engaged in introspection. It was inevitable that learned courts would reason and that reasonable guidelines would emerge.

Respondent accepts the reasoning of the District of Columbia Court of Appeals in *Nader v. de Toledano,* 408 A.2d 31 (D.C. App. 1979), *cert. denied,* 100 S. Ct. 1028, 62 L. Ed. 2d 761 (1980) wherein the Court analyzed what it considered to be three different views toward the application of summary judgment procedure in First Amendment cases, i.e., Judge Wright's opinion in *Wasserman v. Time, Inc.,* 424 F.2d 920 (1970), *cert. denied,* 90 S. Ct. 1844; the view expressed by the Court in *Guam Federation of Teachers Local 1581 v. Ysrael,* 492 F.2d 438 (9th Cir. 1974), *cert. denied,* 419 U.S. 872 (1974); and a somewhat different approach in the Washington Supreme Court case *Chase v. Daily Record, Inc.,* 83 Wash. 2d 37, 515 P.2d 154 (1973), before coming up with a more traditional approach. In *Nader,* the court reasoned:

> "The question to be answered by the Trial Court must and will remain the same—is there a genuine issue of material fact from which a reasonable jury acting reasonably could find actual malice with convincing clarity? Thus, the Court examines the evidence, taking all permissible inferences and resolving questions of credibility in Plaintiff's favor to determine whether *a reasonable jury acting reasonably could find actual malice with convincing clarity.* The question to be resolved at summary judgment is whether Plaintiff's proof is sufficient such that a reasonable jury could find malice with convincing clarity, *and*

not whether the trial judge is convinced of the existence of actual malice." (Court's emphasis). 408 A. 2d, at page 50.

The Second Circuit Court of Appeals has cited with approval *Nader v. de Toledano* in *Yiamouyiannis v. Consumers Union of the United States, Inc.*, 619 F.2d 932 (2d Cir. 1980) where at page 940 the Court, in making its own determination, said:

> "Until more directly advised, we think that this neutral approach correctly states the rule as it is presently in force: neither grant nor denial of a motion for summary judgment is to be preferred. Defamation actions are, for procedural purposes such as discovery, see *Herbert v. Lando,* 441 U.S. 153, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979), or for summary judgment, to be treated no differently from other actions; any 'chilling effect' caused by the defense of a lawsuit itself, see *Herbert v. Lando,* 568 F.2d 974, 980 (2d Cir. 1977) (Kaufman C. J., for the Court), rev'd, 441 U.S. 153, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979); id. at 993-994 (Oaks, J., concurring); *Washington Post Co. v. Keogh, supra,* 365 F. 2d at 968, is simply to be disregarded, to have no force and effect."

It is clear that the Ohio Supreme Court was apprised of the reasoning in *Nader v. de Toledano* in its deliberations, that case having been cited by Respondent, and the Court did in fact adopt the wording of *Nader* in its ruling and its first syllabus.* Further, the Ohio Supreme

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*"Syllabus 1. In ruling upon defendant's motion for summary judgment in a libel action brought by a public official, the court shall consider the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the plaintiff to determine whether a reasonable jury could find actual malice with convincing clarity." (Ohio Supreme Court Opinion, P-A. "A-1").

Court cited the proposition in *Hotchner v. Castillo-Puche*, 404 F. Supp. 1041 (S.D., N.Y.) at page 1050, in its Opinion (P-A. "A-7"),

> ". . . principles applicable to summary judgment motions generally, are applicable to such motions when made in a defamation action." Further, the Ohio Court cited, in support thereof, *Yiamouyiannis v. Consumers Union of the United States, Inc., supra*; and *Tagawa v. Maui Publishing Co.*, 448 P.2d 337 (Hawaii, Sup. Ct. 1968).

Having determined that the Ohio Supreme Court applied the proper standard for review, and that there was no evidence creating a jury issue of actual malice, the Court properly determined that the Appellate Court was correct in rendering summary judgment for Defendant.

The reference to *trial* testimony of Yockey at page 15 of Petitioner's Brief, albeit taken out of context,* has no bearing on whether the evidence before the Court at *Summary Judgment stage* made an issue of actual malice, and references to the effect of the jury verdict, and the jury's answers to Interrogatories are similarly not significant.**

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*Yockey's testimony relative to this point is printed more fully (R-A. A14).

**The Court of Appeals and the Ohio Supreme Court concluded that *trial testimony* and *trial evidence* did not carry Plaintiff's burden of proving actual malice, after the fact (Court of Appeals' Opinion, P-A. "B-13" and Supreme Court's Opinion, Footnote 6, P-A. "A-13").

2. THERE IS NO EVIDENCE OF ANY CONFUSION AMONG STATE OR FEDERAL COURTS RELATIVE TO THE PROPRIETY OF THE USE OF SUMMARY JUDGMENT PROCEDURE IN LIBEL CASES WHICH REQUIRE CLARIFICATION BY THIS COURT.

The law ebbs and flows, adapting itself within the perimeters established by this Court.

There has, of course, been evolution with regard to the use of summary judgment procedures in defamation actions since this Court's pronouncement in *New York Times v. Sullivan, supra.* As previously indicated, Respondent believes that Footnote 9 in *Hutchinson v. Proxmire, supra,* has occasioned a more introspective analysis by trial courts when confronted with such a motion in First Amendment cases. While summary judgment procedure remains as viable as ever, supporting opinions of courts granting the motion indicate a greater regard for and deeper inquiry into the application of the procedure and due process. *Nader v. de Toledano, supra, Yiamouyiannis v. Consumers Union of the United States, Inc., supra.* Recently, trial courts while granting Motions for Summary Judgment on the issue of actual malice in First Amendment cases, have either cited or discussed one or all of the opinions in *Hutchinson v. Proxmire, Nader v. de Toledano* or *Yiamouyiannis v. Consumers Union of the United States, Inc.: Steaks Unlimited v. Deaner, et al.,* 468 F. Supp. 779, *aff'd* 623 F.2d 264 (3rd Cir. 1980); *Rinsley v. Brandt,* 446 F. Supp. 850 (1980) (D.C. Kansas); *Loeb v. Globe Newspaper Co., et al.,* 489 F. Supp. 481 (1980) (D.C. Mass.); *Loeb v. New Times Communication Corp.,* 497 F. Supp. 85 (1980) (D.C. S. Dist. N.Y.); *MacGuire v. Harriscope Broadcasting Co.,* 612 P.2d 830 (1980) (Wyo. Sup. Ct.); *McMurray v. Howard Publication,* 612 P.2d 14

(1980) (Wyo. Sup. Ct.); *DiLeo v. Koltnow*, 613 P.2d 318 (1980) (Colo. Sup. Ct.); *Brophy v. Philadelphia Newspapers, Inc.*, 422 A.2d 625 (1980) (Pa. Sup. Ct., Phila. Dist.). The following recent cases, while not specifically citing *Hutchinson* or *Nader* do, in well reasoned decisions uphold the summary judgment procedure in First Amendment cases: *Fitzgerald v. Minnesota Chiropractic Association, Inc.*, 294 N.W.2d 269 (1980) (Minn. Sup. Ct.); *Hodges v. Oklahoma Journal*, 617 P.2d 191 (1980) (Okla. Sup. Ct.); *Ihle v. Florida Publishing Co.*, 392 So. 2d 1375 (1980) (Fla. Sup. Ct.).

These cases from a broad spectrum of jurisdictions are offered only to refute Petitioner's proposition that there is "confusion" with regard to the propriety of summary judgment procedure. To the contrary, they demonstrate the ability of our judicial system to respond to the interworkings of the First Amendment and due process under the Fourteenth Amendment.

We must comment upon the often used argument that this Court's ruling in *Poller v. Columbia Broadcasting Systems Inc.*, 368 U.S. 464 (1961) precludes the use of summary judgment procedure in libel action because they are not appropriate "where motive and intent play leading roles". We offer the reasoning of the District Court in *Loeb v. Globe Newspaper Co.*, 489 F. Supp. 481 (1980) (U.S. Dist. Ct., Massachusetts), where the Court said, at page 487 in granting the summary judgment for Defendant,

> "Plaintiff correctly observes that summary judgment is disfavored in instances in which motive and intent are at issue. *Poller v. Columbia Broadcasting Systems Inc.*, 368 U.S. 464 (1961). At the same time, courts must be vigilant to prevent unwarranted inquiries into the exercise of First Amendment rights, lest repeated obligations to vindicate a right create

> a burden upon its exercise. In short, as the court determined in *New York Times Co. v. Sullivan, supra,* '[A] rule compelling the critic of official conduct to guarantee the truth of all of his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable self-censorship'. 378 U.S. At 279. The use of summary judgment in this case must balance two competing interests: the obligation to avoid 'chilling' the exercise of treasured First Amendment rights, and caution to avoid foreclosing a genuine issue of fact."

Petitioner cites three state court decisions and three federal court decisions in support of his contention that confusion exists as to the propriety of summary judgment in libel actions.

The first is *Sprouse v. Clay Communications, Inc.* (Supreme Court of Appeals of West Virginia) 211 S.E.2d 674 (1975), a case which does not even deal with the standard to be followed on the issue of "actual malice" in determining a summary judgment motion. *The only summary judgment motion in that case raised the issue of res judicata.* 211 S.E.2d at 694.

In *Good Government Group of Seal Beach, Inc. v. Superior Court of Los Angeles County* (Supreme Court of California) 150 Cal. Rptr. 258, 586 P.2d 572 (1978), the Supreme Court of California, applying the test as to actual malice under *New York Times v. Sullivan* and *Garrison v. Louisiana,* found that Plaintiff's affidavit filed in opposition to Defendants' Motion for Summary Judgment, reciting that Defendants publicly distributed the allegedly libelous article after its original publication and after being aware that the words in the article could be interpreted as defamatory, was sufficient to raise a jury issue as to actual malice.

In *Thomson v. Cash* (Supreme Court of New Hampshire) 402 A.2d 651 (1979), the Supreme Court of New Hampshire affirmed the trial court's denial of Defendant's Motion for Summary Judgment holding:

> "The question before us on this motion for summary judgment is only whether the defendants have met their burden of showing that no genuine issue of fact exists as to the existence of *New York Times* 'malice'. In our opinion, the affidavits and depositions already in the record support the trial court's conclusion that such an issue is presented." 402 A.2d 651.

Since the opinion does not set forth the evidence submitted opposing the summary judgment motion, it can only be presumed that the Court correctly applied the proper standard in determining the Motion for Summary Judgment.

Petitioner next cites *Cianci v. New York Publishing Company* (S.D. New York) 486 F. Supp. 368 (1979) wherein the District Court sustained Defendant's Motion for Summary Judgment on the ground that the evidence submitted failed to raise any jury issue as to actual malice.

In *Church of Scientology of California v. Siegelman* (S.D. New York) 475 F. Supp. 950 (1979), cited with approval in *Cianci v. New York Publishing Company, supra,* the District Court denied summary judgment as to one Defendant only on the basis that material submitted by Plaintiffs opposing the summary judgment motion created a jury issue as to actual malice. Since the opinion does not relate what evidence submitted by Plaintiffs created the jury issue, it can only be assumed that summary procedure was properly followed.

Finally, Petitioner cites *Nader v. de Toledano, supra,* and *Yiamouyiannis v. Consumers Union of the United States, supra,* as examples of confusion with respect to

the use of summary judgment procedure. Respondent disagrees with this assessment, and would cite these two cases as examples of a well reasoned position adopting a "neutral approach" in which summary judgment procedure is neither proffered nor declined, but rather adopting the position that summary judgment will be evenly applied in First Amendment cases as in other civil actions.

CONCLUSION

The decision of the Ohio Supreme Court affirming the Fifth District Court of Appeals' judgment granting summary judgment for the Respondent was proper and for the reasons set forth above the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: May 26, 1981.

APPENDIX

OHIO REVISED CODE

§ 2739.15 Published statements shall be sworn to.

(A) Every statement or article which newspaper companies are required to publish under section 2739.13 to 2739.18, inclusive, of the Revised Code, shall be sworn to by the person offering the same for publication, but the certificate of the notary or other official showing that the statement was so made under oath, shall not be published.

(B) No person shall willfully swear falsely to any such statement or article and whoever does so, is guilty of perjury.

No newspaper company shall be held liable in any civil or criminal proceedings for anything in any such statement or article.

§ 2739.16 Refusal or failure to publish.

(A) No newspaper company shall refuse or fail to print, publish, and circulate any statement or article if true as required by sections 2739.13 to 2739.18, inclusive, of the Revised Code.

(B) Any person responsible for refusing to print, publish, and circulate any statement or article mentioned in division (A) of this section shall be fined as provided in division (C) of section 2739.99.

The prosecuting attorney of the county in which such newspaper is published, when complaint is made to him in writing of the refusal or failure of any newspaper company or persons to comply with sections 2739.13 to 2739.18, inclusive, of the Revised Code relative to the publication

of such statements or articles, shall investigate said complaint and upon reasonable cause begin proceedings against such newspaper company or person and prosecute the same.

§ 4749.05 Required to report to sheriff and police chief.

(A) Each private investigator shall report the location of branch offices to the department of commerce, to the sheriff of the county and the police chief of any municipality in which the office is located, and shall post a certified copy of his license conspicuously therein. If a licensee moves an office, he shall notify, in writing, the department and any affected sheriff and chief of police within forty-eight hours of the change.

(B) No private investigator nor any of his employees shall engage in the business of private investigation unless, within twelve hours of their arrival, they report their presence and length of stay to the sheriff and police chief of any county or municipality in which they operate.

OHIO RULES OF CIVIL PROCEDURE

Rule 56

SUMMARY JUDGMENT

(A) For party seeking affirmative relief. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. However, if the action has been set

for pretrial, a motion for summary judgment may be made only with leave of court. If the action has been set for trial, a motion for summary judgment may be made only with the consent of all parties.

(B) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. However, if the action has been set for pretrial, a motion for summary judgment may be made only with leave of court. If the action has been set for trial, a motion for summary judgment may be made only with the consent of all parties.

(C) Motion and proceedings thereon. The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(D) Case not fully adjudicated upon motion. If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(F) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion for

summary judgment that he cannot for sufficient reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(G) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

The Times Reporter

Opinion

Editorials
Analysis
Columns
Letters

Dover-New Philadelphia, O. Founded July 12, 1903

Harry R. Horvitz, Publisher
Harry Yockey, Editor

Jack D. Shores, General Manager
James E. Davis, Managing Editor

Page A-4 Wednesday, April 9, 1975

Prosecutor's office remiss

The Tuscarawas County prosecutor's reaction to the seizure of a stolen stereo set and several other items at a New Philadelphia apartment by Jerry Dupler, Dover councilman and a private eye, is somewhat surprising.

Prosecutor Ron Collins indicated there would not be any prosecution because of "a lack of criminal intent."

Private investigators, under Ohio law, must inform authorities 12 hours in advance of participation in a case. The prosecutor revealed he had been contacted about a search warrant the night Dupler, acting in behalf of Brad Dinolfo, made the seizure. However, the prosecutor said he didn't think police had "sufficient justification" for a warrant.

The prosecutor's office, we are certain, prosecutes numerous cases wherein "criminal intent" is not evident. J. C. Shew, an assistant prosecutor, added that their office isn't concerned that Dupler, employed by Cloverleaf Security, had not informed police of his intentions. Nor is the prosecutor's office concerned over the fact that Dupler did not have a search warrant.

It seems to us that Dupler, if he is qualified as a licensed private investigator, ignored Ohio law twice—by not giving authorities the proper notification and then by making a seizure without a search warrant.

It is proper to ask, in view of the circumstances, what the intent was behind Dupler's actions. It also is proper to ask if the prosecutor's office is politically motivated in its unconcern.

If Jerry Dupler is going to continue his work as a private eye the prosecutor's office should at least make certain he refrains in the future from ignoring Ohio statutes.

A7

LAW OFFICES
SANI AND BARNHOUSE
Warm Building - Public Square
New Philadelphia, Ohio 44663
Area Code 216
364-5538

Joseph F. Sani
James R. Barnhouse

August 6th, 1975.

The Editorial Department,
Times Reporter,
629 Wabash Ave.,
New Phila., Ohio.

In re: Jerry Dupler matter.

Dear Sirs:

I am enclosing a statement and article that has been prepared for and on behalf of Mr. Jerry Dupler. As his representative I am sending this to you at his request, in accordance with the statutes of the State of Ohio.

So that your department will know the particular statutes referred to, I am enclosing a copy for your consideration. They are Section 2739.13, Section 2739.14, Section 2739.15, and Section 2739.16 of the Revised Code of the State of Ohio.

Demand is being made for the publication of the verified enclosed statement and article in accordance with these statutes.

Very truly yours,

SANI & BARNHOUSE LAW OFFICES,
By /s/ James R. Barnhouse
James R. Barnhouse.

JRB:er
encls.

EDITORIAL RETRACTION

This paper on April 9th, 1975 was incorrect in an editorial which was titled "PROSECUTOR'S OFFICE REMISS". At the time the article was printed, this paper was in error that Jerry Dupler, while acting in his capacity as a private investigator, had not complied with the Ohio law in connection with giving the authorities proper notification of his activities.

Private Investigator Jerry Dupler is wellknown and was wellknown by the Dover Police Department and the New Philadelphia Police Department at the times referred to in the newspaper articles that preceded the editorial comment and said authorities had in fact been contacted in accordance with the statute then in effect.

This paper in said editorial implied that Jerry Dupler was not qualified as a licensed private investigator and this in fact was not true. This paper in its editorial also stated that Dupler ignored Ohio law twice - by not giving authorities the proper notification and then by making a seizure without a search warrant. This also was in fact untrue because the New Philadelphia Police Department was contacted before Mr. Dupler took any action. He also was not required to obtain a search warrant before he recovered any property that belonged to his client.

Investigator Dupler did in fact make it possible for the New Philadelphia Police Department to seize property under a seizure by a consent search which was in writing and given to the Police Department. A search warrant is a written instrument that is used by law enforcement officers in seizing property for the purpose of using the same as evidence in a criminal prosecution and would have no relationship whatsoever to a private individual obtaining such property for a different purpose.

In the instance referred to in said editorial and in other incidents since that time, Jerry Dupler, in his work as a private investigator, has aided and assisted individuals in recovering stolen property.

STATE OF OHIO,
TUSCARAWAS COUNTY, SS:

AFFIDAVIT.

I, Jerry Dupler, being first duly sworn on my oath, state that the facts as set forth in the foregoing article are true.

/s/ Jerry Dupler
Jerry Dupler

Sworn to before me and subscribed in my presence this 6th day of August, 1975.

/s/ Enid Randles
NOTARY PUBLIC.

Editorial is rebutted

(Editor's Note: The following was submitted by Jerry Dupler, Dover city councilman and an employe of Cloverleaf Security.)

The Times-Reporter on April 9, 1975, was incorrect in an editorial which was titled "Prosecutor's office remiss." At the time the article was printed, the paper was in error that Jerry Dupler, while acting in his capacity as a private investigator, had not complied with the Ohio law in connection with giving the authorities proper notification of his activities.

Private Investigator Jerry Dupler is well known and was well known by the Dover police department and the New Philadelphia police department at the times referred to in the newspaper articles that preceded the editorial comment and said authorities had in fact been contacted in accordance with the statute then in effect.

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Investigator Dupler did in fact make it possible for the New Philadelphia police department to seize property under a seizure by a consent search which was in writing and given to the police department. A search warrant is a written instrument that is used by law enforcement officers in seizing property for the purpose of using the same as evidence in a criminal prosecution and would have no relationship whatsoever to a private individual obtaining such property for a different purpose.

In the instance referred to in said editorial and in other incidents since that time, Jerry Dupler, in his work as a private investigator, has aided and assisted individuals in recovering stolen property.

Jerry Dupler
110 W. Slingluff av.
Dover

EXCERPTS FROM DEPOSITION OF DUPLER

Excerpts from testimony of Petitioner Dupler upon deposition submitted in support of Motion for Summary Judgment, beginning at page 11 (Emphasis and brackets ours):

By Mr. Hanhart:

[11] Q. Jerry, you have alleged in your Complaint that the Defendant, with actual malice, published the Editorial of April 9, 1975, is that correct?

A. That's correct.

Q. Now, what facts do you have to support the allegations of actual malice?

A. The newspaper, knowingly and intentionally, with knowledge of the truth, printed falsities in its Editorial by mis-quoting Sections of the Ohio Revised Code, and I consider this a direct insinuation and a direct charge of criminal conduct by the Editorial.

Q. Now, from what circumstances or what facts do you determine that they did this with malice?

A. As I just stated, with knowledge that it was a falsity they printed it.

Q. Now, do you know who at the newspaper had knowledge that the facts that they had printed were untrue.

A. Evidently the Editor or whoever wrote the Editorial, *I don't know personally.*

Q. Now, are you saying that the person who wrote the Editorial had knowledge other than what was in the Editorial?

[12] A. *I have no way of knowing* because I don't know who wrote the Editorial at this point.

Q. So, of your own personal knowledge you don't know that anyone at the newspaper had any knowledge other than that which was printed?

A. Anyone at the newspaper?

Q. Yes?

A. *No, I agree with that.*

Q. All right, who at the newspaper knew the facts to be different than what was printed?

A. I would say the editorial staff.

Q. Now, who on the editorial staff?

A. That would include the editor and those people who worked under him.

Q. Now, do you have any facts which prove that they had knowledge different than what was printed or is it your assumption that they knew?

A. *The law, it directly conflicts with what they printed, so I have to say that would be in a direct conflict with the law itself. I would have to say that this is my reason* for stating it was done with malice.

Q. You don't know specifically of anyone who had this knowledge that you complain of?

A. *No.*

Q. You're assuming someone had knowledge, is that right?

[13] A. *That's correct,* someone had to have knowledge.

Q. Now, you have alleged that they intended to injure and defame you and your character and reputation; what facts do you have which would indicate that they intended to injure?

A. In my petition, I think the Editorial itself is explanatory in that nature, referring to the Editorial as a whole.

Q. Now, are you alleging that they were out to get you, is that what you're saying?

A. I think it's rather evident.

Q. *So, that is your opinion?*

A. *Yes.*

Q. Who was out to get you?

A. I would say, only going by the title, the Times Reporter, people at the Times Reporter.

Q. Had the Times Reporter ever supported you?

A. Had they ever supported me?

Q. Yes, in your capacity as councilman, for Mayor, this type of thing?

A. As a councilman, yes.

Q. They did support you?

A. Yes.

* * * * *

[17] Q. I believe you indicated, Jerry, that you felt that the Defendant was aware, was fully aware of the facts of the incident prior to the publication of April 9, 1975, is that correct?

A. That's correct.

Q. Are you aware that in your Complaint you have indicated that the acts and conduct of the Defendant amounted to recklessness when the defamatory potential of the Editorial was apparent in publishing the same *without* full knowledge of the truthfulness of all of the facts, are you aware that you have alleged that they did *not* have knowledge of the truthfulness?

A. *That's correct.*

Q. *Is your allegation in your Complaint correct?*

A. *It is correct.*

* * * * *

[18] Q. And you know of no specific facts that would substantiate your claim of actual malice?

A. *I know of no specific.*

Q. Specific facts that would substantiate your claim of actual malice?

A. I say that knowledge of the truth and the failure to print the truth is a fact.

Q. But you have alleged that they did not have knowledge of the truth; do you feel now that they had knowledge of the truth?

[19] A. Basically I'm afraid I'm going to have to take exception to the question on the basis that you can know part of the truth and not all of the truth.

Q. Are you alleging that they knew part of the truth and not all of the truth?

A. I'm only saying it it's possible that a person can have only—I'm saying that they did have basic or most or all of the knowledge.

* * * * *

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

The following excerpts from the transcript is the testimony of Editor Yockey both on Cross-examination and on Direct examination, relating to the circumstances surrounding his writing and publishing of the editorial (Exhibit A - Appendix A). Cross-examination begins at page 95 of the transcript and is conducted by Attorney Tripodi:

By Mr. Tripodi:

[95] (Q) Mr. Yockey, on or about April 9, do you recall writing an editorial on that date?

(A) Yes.

(Q) Mr. Yockey, I'm going to hand you what has been marked as Plaintiff's Exhibit "A" and I'll ask you to look that over, please?

Do you know what that is?

(A) It's the editorial page.

(Q) What page is it and from what newspaper?

(A) Page A-4.

(Q) Who published that article?

(A) Times Reporter.

(Q) Who wrote that article?

(A) I did.

(Q) Where did that particular editorial appear? I think you mentioned Page A-4. What portion of the page did it appear?

[96] (A) Left side.

(Q) Now, what you're holding is the page in question, that's marked Exhibit "A". Is that correct?

(A) Yes.

(Q) That's not the whole newspaper?

(A) No.

(Q) Just a portion of it?

(A) Yes.

(Q) And is that the top lead editorial of April 9, 1975?

(A) Yes.

(Q) Now, what is the editorial? "Prosecutor's Office Remiss",—is that the thing you wrote?

(A) That's the headline.

(Q) Did you prepare the headline?

(A) Yes.

(Q) Did you also prepare the writings thereunder?

(A) I wrote it. Yes.

(Q) Now, where did you get the information upon which that editorial and the facts contained therein were based?

(A) Based on the story that ran previously.

(Q) Were there more than one story?

(A) There were two.

[97] (Q) All right. Do you recall those stories without seeing them at all? Do you recall the stories without having them before you?

(A) I can't recall them word for word. I can give you a general idea of what they were.

(Q) Was there any other sources of information that you looked at prior to the writing of the article on April 9, 1975?

(A) No.

(Q) Now, did you at any time yourself, talk to the Prosecuting Attorney's office prior to April 9, 1975?

(A) No.

(Q) Did you talk to Jerry Dupler at any time prior to April 9, 1975?

(A) No.

(Q) Did you know prior to April 9, 1975, who Jerry Dupler was?

(A) Yes.

(Q) Did your newspaper have in its possession, prior to April 9, 1975, a biographical file on Jerry Dupler,—if you know?

(A) I'd have to answer that "yes".

(Q) Now, in that file—(strike the question.) What is a biographical file,—for the Jury's benefit?

* * * * *

[98] (Q) Now, in this particular editorial, marked Exhibit "A", did your editorial state, in fact, quoting, that "Private investigators, under Ohio law, must inform authorities 12 hours in advance of participation in a case."?

(A) Yes.

(Emphasis and brackets ours)

(Q) Now, did you, in fact, [prior to that article,] know that Mr. Dupler had, in fact, notified the Police Department of New Philadelphia relative to the participation in that case?

[99] (A) *All I know is what was in the previous*—in *the initial story.*

(Q) Did anybody who worked for The Times Reporter check with the Police Department to get that information,—if you know?

(A) Yes, that's the only way they would have gotten it.

(Q) And in preparing or writing that article, did you put in that editorial that you didn't know the facts that you were writing about?

(A) No.

(Q) In other words, in this article, you didn't put down, "The Editor does not know, or have the facts of which I am writing."?

(A) No.

(Q) Is that a standard practice of the Editorial Staff, not to get the facts before they print them?

(A) I'm not sure what you're asking, but most editorials are written in this vein,—are based on news stories.

(Emphasis ours)

(Q) *So, again, the answer, I guess you are giving me is, you wrote this from previous stories?*

(A) *On the basis of a news story,—yes.*

(Q) Now, these previous news stories that you mentioned, for the purposes of identification, marked "F" and "G"—(Mark these, please)

(Plaintiff's Exhibits "E", "F" & "G" were marked for identification)

[100] (Q) Mr. Yockey, for the purposes of the record and to help you refresh your memory, I'm going to hand you at this time, Plaintiff's Exhibit "G" I'll have you look at that one first.

(A) Okay.

(Q) Do you know what you are holding in your hand?

(A) Yes.

(Q) What is it?

(A) This is the original story.

(Q) What date did it appear and what newspaper?

(A) It appeared on Friday April 4, 1975 on page 3.

(Q) And Plaintiff's Exhibit "F"? What is that you are holding in your hand?

(A) This one appeared on Tuesday April 8, 1975 on page 3.

(Q) Whose newspaper was that printed in?

(A) Times Reporter.

(Q) Now, in that article on April 9, 1975, you have stated that you printed that the law says that he had to inform authorities twelve hours in advance of coming into the city. Is that correct?

(A) Yes,—repeat the question, please.

(Q) On the article of April 3, Plaintiff's Exhibit "A", you state in that article that under the **[101]** law, he had to notify authorities twelve hours in advance of coming into the city?

(A) Yes.

(Q) Is that correct?

(A) Yes.

(Q) Now, did, in fact, that law state that?

(Emphasis ours)

(A) *That I can't tell you. All I know is what it says here in the story,*—what Chief Locker said.

(Q) Now, I'm going to hand you what's been marked as Plaintiff's Exhibit "E".

I'll ask you to examine Plaintiff's Exhibit "E" if you would, Mr. Yockey, and I'll ask you if you can identify what you are holding?

(A) A section of the Ohio Code.

(Q) Does that section 4749.05, section A & B, appear on Exhibit "E"?

Mr. Hanhart: Objection.

The Court: Let him answer. Overruled.

Mr. Yockey: Repeat the question, please?

(Thereupon, question was read by reporter)

Mr. Hanhart: Objection again.

[102] The Court: Overruled.

(A) Yes.

By Mr. Tripodi:

(Q) Now Mr. Yockey, that section of the law,—when you printed that article, you stated that he had to notify the police chief twelve hours in advance. Is that correct?

(A) Yes.

(Q) The section of law says "within—

Mr. Hanhart: Objection, Your Honor.

The Court: Overruled.

By Mr. Tripodi:

(Q) "within twelve hours of coming into the community." Is that correct? Look at the section, please. Sec. B.

Mr. Hanhart: Objection.

The Court: Overruled.

(A) Yes, it says "within twelve hours of their arrival."

[103] (Q) What you printed in the article of April 9, 1975, and referring to that Ohio Statute and what the law is, is the statement of April 9, 1975, true or false?

Mr. Hanhart: Objection.

The Court: He may answer.

(Q) Is the article true or false? That statement is "in advance—12 hours in advance", as opposed to what the law is—

(A) As opposed to the law, it would be false.

Mr. Hanhart: Objection. Move to strike the answer.

The Court: Overruled.

By Mr. Tripodi:

(Q) Now, in your editorial on Exhibit "A" again, Mr. Yockey, I want to keep referring back to that. I don't want to keep too much here on your desk,—but on the left-hand side of that article, beginning on the paragraph on the upper right- **[104]** hand side, did your editorial state that Mr. Dupler had not informed the police of his intentions?

(A) On the right-hand side,—yes.

(Q) It says: "It seems to us that Dupler, if he is qualified as a licensed private investigator, ignored Ohio law twice—by not giving authorities the proper notification and then by making a seizure without a search warrant."

(A) Where did you read that from?

(Q) Right here,—and above that, did you print that he "had not informed police of his intentions."? It says: "J. C. Shew, an assistance prosecutor, added that their office isn't concerned that Dupler, employed by Cloverleaf Security, had not informed police of his intentions."

Now, in the next following paragraph, I think you quote: "It seems to us that Dupler, if he is qualified as a licensed private investigator ignored Ohio law twice"—(there is a dash)—"by not giving authorities the proper notification and then by making a seizure without a search warrant."

Now,—in that, what law were you talking about?

(A) I'm quoting from the story here, which says: "According to police, Dupler, a Dover mayoral candidate, violated a section of the Ohio Revised [105] Code which states a private investigator must give a sheriff and police chief 12 hcurs advance notice of his involvement in a case."

(Q) Now, in accordance to what you just read,—you read from where?

(A) Plaintiff's Exhibit "G". The original story.

(Q) That was printed on what date, Sir?

(A) That was April 4.

(Q) And in the April 4 and April 8 articles, were you informed, or did these articles state that, in fact, no Ohio law was violated?

(A) According to the police, he violated a section of the Ohio Revised Code,—according to the Police Chief, who made that comment.

(Q) Do you know who wrote that story?

(A) I think that story was written by Tom Simmelink, I believe.

(Q) All right. Now, in those two articles, Exhibits "G" and "F", was the newspaper informed by the Prosecuting Attorney that Dupler had violated no law?

Mr. Hanhart: Objection.

The Court: (Addressing court reporter) Read the question.

[106] (Thereupon, question was read to Court)

The Court: Overruled.

(A) That, I don't know.

(Q) I'd like you to look at Exhibit "F". The next to last paragraph, where it quotes J. C. Shew, I believe, "Dupler in no way obstructed the administration of justice."

Do you find that?

(A) Yes.

(Q) Did you find that—where it said there was no obstruction of justice?

(A) Right.

(Q) Now, when you wrote that editorial, did you pick that up in that editorial or in that article and put it in the newspaper in the editorial,—that there was no obstruction of justice?

(A) No, I did not.

(Q) You put it down that he violated the law twice. Is that correct?

(A) On the basis of the previous story,—yes.

(Q) Now, from the article you hold in your hand, Exhibit "F", and the comment therein, and what you printed on April 9, 1975, is what you printed [107] on April 9, 1975 true or false?

(A) Will you repeat the question?

(Thereupon, question was read to witness)

(A) I would say it's false.

(Q) And further, in the April 9, 1975 editorial, you stated in so many words, that he searched without a warrant?

(A) Yes.

(Q) And in the article you hold in your hand, that was before you when you wrote the April 9 article, that said that there was no obstructions of law—

Mr. Hanhart: I'm going to object, Your Honor.

Mr. Barnhouse: This is cross examination.

The Court: Overruled.

By Mr. Tripodi:

(Q) —that said he in no way obstructed justice. Is that correct?

(A) That's what it says.

(Q) Now, when you put the statement in the April 9, 1975, editorial, that he had to have a search [108] warrant or he violated a law about a search warrant, were you taking it from the previous article?

(A) Yes. I did take it from the previous article. I think it was taken from there.

(Q) That he in no way obstructed justice? You took it from the article?

Mr. Hanhart: Objection, Your Honor. There are two questions there.

The Court: Objection sustained.

By Mr. Tripodi:

(Q) Mr. Yockey, when the April 8, 1975 article stated that he in no way obstructed justice, did you read that?

(A) Yes.

(Q) Then on April 9, 1975, you said in your editorial that he violated two sections of Ohio law. Correct?

(A) Yes.

(Q) One being the 12 hour notification statute?

(A) Yes.

(Q) And the other one being search without a search warrant?

(A) He did not have a search warrant?

[109] (Q) Now, from the article on April 8 to the article of April 9, was what you printed on April 9 a true or false statement?

(A) I'd have to say it was false.

(Q) Now, Mr. Yockey, do you know of your own knowledge, what the penalty is, the criminal penalty is, for violation of 4749.05 (A)?

(A) No.

(Q) You have not been told that it carries a prison sentence?

Mr. Hanhart: Object, Your Honor.

The Court: You may answer the question.

Mr. Hanhart: Does that relate to the time he wrote the article or since, Your Honor?

The Court: I'm going to let him answer.

(A) No.

(Q) You don't know the penalty? Did you attempt to find out what the penalty was?

(A) No.

(Q) Did you care what the penalty was?

[110] (A) Well, I didn't know I violated a law.

(Q) You didn't know?

(A) No.

(Q) You shoot the gun. You don't know where the bullet aims,—hits?

(A) I wasn't shooting a gun.

(Q) You weren't?

(A) No.

(Q) Now, in the April 9, 1975 editorial, again, I believe you stated in that article,—and I'll attempt to quote from it, from the second full paragraph on the right hand column,—quoting: "It seems to us that Dupler, if he is qualified as a licensed private investigator—", —did you print that?

(A) Yes.

(Q) Did you write that?

(A) Yes.

(Q) Now, in your prior articles, in the articles,—did it not, in fact, state that Dupler, in Plaintiff's Exhibit "F", did it not state, quoting, on the third paragraph, second column of Plaintiff's Exhibit "F", that "Dupler is a licensed private investigator?"

(A) Yes.

[111] (Q) Now, when you printed your April 9, 1975 article, was that statement, "if he is qualified", a true or false statement?

(A) I'm asking a question,—if he is a qualified private investigator.

(Q) You knew he was from the articles printed before?

(A) That's what the article says,—yes.

(Q) Are you now questioning the articles that were printed prior?

(A) I'm not questioning—I'm just saying,—if he is.

(Q) Pardon me?

(A) I'm just saying, "if he is a qualified private investigator".

(Q) You didn't take the wording from the Editorial Staff in Plaintiff's Exhibit "F" then?

(A) I could have said, "as a private investigator—

(Q) The question is,—did you take the wording from the prior articles?

(A) No.

(Q) So what, in fact, you did then, Mr. Yockey, was totally disregard whatever the truth was and printed what you wanted to print?

(A) I would have to say yes.

Direct examination of Editor Yockey regarding the circumstances surrounding the writing of the editorial, pertinent to the issue of his "knowledge" or "state of mind" at the time of publication, Direct examination by Attorney Hanhart, at page 393:

By Mr. Hanhart:

[393] (Q) Having read the article of April 4, Harry, written by Tom Simmelink, which is Exhibit "G", I'll ask you whether or not you formed a belief

as to whether the facts in that article were true or false?

[394] (A) Yes.

(Q) All right, Sir. What was that belief?

(A) That they were true.

(Q) What was the basis for your belief?

(A) Well, Simmelink is a qualified reporter,—qualified writer.

(Q) Now Harry, I'll ask you, having read the article of April 8, written by Joe Mizer, which is Exhibit "G",—Exhibit "F" prior to your writing the editorial of April 9, I'll ask you whether or not you formed a belief as to whether the facts in that article were true or false?

(A) Yes.

(Q) And I'll ask you what that belief was?

(A) That the facts were true.

(Q) And did you have a basis for that belief?

(A) The same basis as I had for this one. This one was written by Joe Mizer, a very trustworthy, qualified reporter.

(Q) All right, Sir. Now Harry, having written your article of April 9, 1975, your editorial of April 9, 1975 which is Exhibit "A" and having sent that to the composing room, I'll ask you whether or not at the time you wrote it, and published it, whether you had a belief as to whether the facts in that editorial were true or false?

(A) That they were true.

[395] (Q) You had a belief. Is that correct?

(A) Yes.

(Q) What was the belief?

(A) That the facts were as they were stated in the two articles.

(Q) And did you believe that you had correctly quoted those facts in the editorial of April 9? Your Honor, I'll re-phrase the question.

The Court: If you chose, you may ask the question again.

(Q) Fine. Having prepared your editorial of April 9 and written it and sent it to the composing room for publishing, I'll ask you whether or not you had a belief at that time, as to whether the facts in that editorial were true or false?

(A) Yes.

(Q) What was that belief?

(A) That they were true.

Mr. Hanhart: No further questions.